

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 55

Docket No. DE-0752-07-0485-A-1
DE-0752-08-0090-A-1

John D. Wightman,

Appellant,

v.

Department of Veterans Affairs,

Agency.

April 15, 2009

Pearson E. Dubar, Esquire, Olathe, Kansas, for the appellant.

G.M. Jeff Keys, Esquire, Saint Louis, Missouri, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision that awarded him attorney fees and costs in the amount of \$82,768.91. For the reasons set forth below, we GRANT the appellant's petition under [5 C.F.R. § 1201.115](#), and AFFIRM the initial decision AS MODIFIED herein, awarding the appellant \$85,228.91 in attorney fees and costs.

BACKGROUND

¶2 The appellant filed a Board appeal that asserted that he was subject to an involuntary retirement from the position of Housekeeping Aid at the agency's Leavenworth Veterans Administration Medical Center in Leavenworth, Kansas.

Initial Appeal File (IAF), Tab 1. The appellant also asserted that the agency: constructively suspended him for more than fourteen days; denied him restoration as a partially recovered employee; and discriminated against him based on his disability.¹ IAF, Tab 30.

¶3 After holding the appellant's requested hearing, the administrative judge issued an initial decision that found the Board's jurisdiction was proven with regard to the constructive suspension and involuntary retirement appeals and reversed those actions, but found unproven the appellant's affirmative defense of disability discrimination. IAF, Tab 42 at 2, 16-29. The administrative judge dismissed the appellant's restoration appeal for lack of jurisdiction. *Id.* at 2, 27-29. The initial decision became the final decision of the Board when neither party filed a petition for review of that decision. *Id.* at 31-32.

¶4 The appellant filed a motion for attorney fees seeking \$84,720.00 (\$200.00 per hour x 423.60 hours) in fees and \$508.91 in costs. Attorney Fee File (AFF), Tab 1 at 1, 16. The administrative judge issued an acknowledgment order informing the appellant of his burden and the elements to establish his entitlement to attorney fees. AFF, Tab 2. The agency submitted a response opposing \$18,700.00 of the appellant's requested attorney fees and \$38.80 of the appellant's requested costs. AFF, Tab 7 at 3-4.

¶5 Based on the written record, the administrative judge issued an initial decision that granted in part and denied in part the appellant's motion for attorney fees. AFF, Tab 9, Initial Decision (ID) at 2, 4-5. The administrative judge found, and the agency did not dispute, that: (1) an attorney-client relationship existed pursuant to which counsel rendered legal services on behalf of the appellant in connection with a Board proceeding; (2) the appellant was the prevailing party; and (3) an award of attorney fees is warranted in the interest of

¹ The appellant's constructive suspension, involuntary retirement, and restoration claims were docketed as separate appeals – MSPB Docket Nos. DE-0752-08-0090-I-1, DE-0752-07-0485-I-1, and DE-0353-08-0207-I-1, respectively - but were joined for adjudication. IAF, Tab 38 at 1, Tab 42 at 1-2.

justice. ID at 2; AFF, Tab 7. With respect to the challenges raised by the agency, the administrative judge found that the appellant: is entitled to recover \$14,200.00 in fees and \$38.80 in costs incurred during the processing of his formal equal employment opportunity (EEO) mixed-case complaint filed with the agency prior to his Board appeals, even though his discrimination claim in his mixed-case constructive suspension and involuntary retirement appeals before the Board was unsuccessful; is entitled to recover \$2,040.00 in fees for his unsuccessful but nonfrivolous motions to compel discovery and for sanctions; and is not entitled to collect \$2,460.00 in fees for 12.3 hours of work performed on August 6 and August 11, 2008, because these matters relate to the appellant's pending petition seeking review of the Board's final decision on his discrimination claim before the Equal Employment Opportunity Commission (EEOC). ID at 4. The administrative judge awarded the appellant \$82,260.00 in attorney fees and \$508.91 in costs. *Id.*

¶6 The appellant has filed a petition for review, to which the agency has responded. Petition for Review File (PFRF), Tabs 1, 3.

ANALYSIS

¶7 To establish entitlement to an award of attorney fees, an appellant must show that: (1) he was the prevailing party; (2) he incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. [5 U.S.C. § 7701\(g\)\(1\)](#); *McKenna v. Department of the Navy*, [108 M.S.P.R. 404](#), ¶ 8 (2008); *Social Security Administration v. Price*, [94 M.S.P.R. 337](#), ¶ 8 (2003), *aff'd*, [398 F.3d 1322](#) (Fed. Cir. 2005); ID at 2.

¶8 As the administrative judge correctly found, it is undisputed that: the appellant was a prevailing party; the appellant incurred attorney fees pursuant to an existing attorney-client relationship; and an attorney fees award is warranted in the interest of justice. ID at 2; AFF, Tab 7; PFRF, Tabs 1, 3. Thus, the only issue disputed below was whether the fees and costs requested by the appellant are reasonable. ID at 2. As set forth above, with the exception of 12.3 hours that

the administrative judge disallowed, the administrative judge granted the appellant's motion for attorney fees and costs. ID at 1-4; AFF, Tab 1 at 1-16, Ex. 2.

¶9 On petition for review, the appellant asserts that the administrative judge erred in disallowing 12.3 hours because the administrative judge erroneously found that these hours represented work that involved the appellant's pending petition seeking review of the Board's final decision on his discrimination claim before the EEOC. PFRF, Tab 1 at 2-4; ID at 2, 4. In response, the agency does not object, per se, to the merits of appellant's assertions on review, but it asserts that the Board should not consider the appellant's assertions because the appellant did not utilize his opportunity below to submit additional evidence on this issue. PFRF, Tab 3 at 3.

¶10 The agency asserted below that the 5.7 hours billed on August 6, 2008, and the 6.6 hours billed on August 11, 2008, should be disallowed because "these 12.3 hours appear to be devoted to the [appellant's] preparation of a now-pending appeal of the Board's decision to the [EEOC]." AFF, Tab 7 at 3. The agency did not provide any further argument or evidence to support its assertion that the disputed 12.3 hours involve the appellant's pending petition with the EEOC, and the record below is lacking any evidence showing that the appellant petitioned the EEOC to review the Board's final decision regarding his disability discrimination claim.² AFF, Tabs 1-8. In finding that these hours should be excluded from the appellant's requested fees award, the administrative judge merely concluded that the agency's objection to the "12.3 hours in fees that involve the appellant's

² Although the Office of the Clerk of the Board received a September 3, 2008 request from the EEOC for a copy of the Board's file in this matter, as the appellant had filed an August 21, 2008 petition with the EEOC seeking review of the Board's findings on his discrimination claim, there is no indication that the parties had submitted any evidence below showing that the appellant had filed a petition with the EEOC. EEOC Request File, Tab 1; AFF, Tabs 1-8. On January 8, 2009, the EEOC issued a decision concurring with the Board's final decision finding no discrimination. *Wightman v. Peake*, EEOC Petition No. 0320080103, 2009 WL 124676 (Jan. 8, 2009).

pending appeal before the [EEOC] relating to the Board's finding of no discrimination" is "correct"; the administrative judge did not provide any explanation as to why she found that these 12.3 hours in fees involve the appellant's petition with the EEOC. ID at 4.

¶11 The Board has held that the administrative judge who adjudicated the case on the merits is in the best position to determine whether the number of hours expended is reasonable, and, absent a specific showing that the administrative judge's evaluation was incorrect, the Board will not second-guess it. *Sowa v. Department of Veterans Affairs*, [96 M.S.P.R. 408](#), ¶ 11 (2004); *Ruble v. Office of Personnel Management*, [96 M.S.P.R. 44](#), ¶ 13 (2004). However, if an administrative judge decides not to award fees for hours of attorney service that are adequately documented, the administrative judge must identify those hours and give a clear explanation for their elimination. *Crumbaker v. Merit Systems Protection Board*, [781 F.2d 191](#), 195 (Fed. Cir. 1986), *modified on other grounds*, [827 F.2d 761](#) (Fed. Cir. 1987); *Casali v. Department of the Treasury*, [81 M.S.P.R. 347](#), ¶ 14 (1999). The administrative judge's reasons for the reduction in hours must not be conclusory, but, rather, must be carefully explained. *Mudrich v. Department of Agriculture*, [92 M.S.P.R. 413](#), ¶ 12 (2002).

¶12 Because the itemized billing statement prepared by the appellant's counsel is adequately documented and does not support the administrative judge's conclusory finding that the hours billed on August 6 and August 11, 2008, relate to the appellant's petition with the EEOC, we find that the administrative judge erred in disallowing these 12.3 hours. ID at 4; *see, e.g., Mudrich*, [92 M.S.P.R. 413](#), ¶¶ 12-13 (the administrative judge's conclusory remark that "there does not appear to have been any reason for research at this stage in the proceeding" did not provide a sufficient justification to reduce the hours claimed in an attorney fees request); *cf. Sowa*, [96 M.S.P.R. 408](#), ¶ 11 (denying the appellant's petition for review where it constituted mere disagreement with the administrative judge's thoughtful and thorough explanations for denying the various fees at issue).

¶13 An appellant is entitled to recover attorney fees for time spent preparing a motion for attorney fees. *Russell v. Department of the Navy*, [43 M.S.P.R. 157](#), 162 (1989), *modified on other grounds by Garstkiewicz v. U.S. Postal Service*, [50 M.S.P.R. 476](#), 478-79 (1991). The itemized billing statement prepared by the appellant’s counsel shows that the hours billed between July 23, 2008, and August 16, 2008, including the hours billed on August 6 and 11, 2008, correlate to the issues raised and briefed in the appellant’s August 21, 2008 motion for attorney fees.³ AFF, Tab 1 at 4-16, Ex. 2 at 10-11. Specifically, on August 6, 2008, the appellant’s counsel documented his 5.7 hours of work as “[c]onducted legal research on involuntary retirement and restoration claim and prepared motion”; in the fees motion, the appellant asserted, *inter alia*, that he is entitled to attorney fees for his successful claim of involuntary retirement, and that, although he was not successful on his restoration claim, fees for work performed on his restoration claim are reasonable because this claim is related to the core facts underlying his successful involuntary retirement claim. AFF, Tab 1 at 5-11, Ex. 2 at 10.

¶14 Additionally, with respect to the fees generated on August 11, 2008, the appellant’s counsel documented his 6.6 hours of work on this date as “[c]onducted legal research on affirmative defense and discrimination complaint and prepared motion.” AFF, Tab 1, Ex. 2 at 10. The appellant asserted in his fees motion, under separate sections titled “Affirmative Defense” and “Discrimination Complaint,” that he is entitled to reasonable fees for his “unsuccessful affirmative defense” in his Board appeals and for the work performed in support of his “unsuccessful EEO complaint” that was filed with the agency prior to his Board appeals. AFF, Tab 1 at 12-14. Not only does the description of the attorney fees generated on August 11, 2008, correlate to the arguments made by the appellant in his attorney fees motion, but the

³ Other than the fees the administrative judge disallowed for work performed by the appellant’s counsel on August 6 and 11, 2008, the administrative judge did not disallow fees for work performed on the appellant’s attorney fee motion. ID at 2-4.

administrative judge, over the agency's objection, awarded the appellant attorney fees "incurred during the processing of his mixed-case complaint" before the agency, even though the appellant was not successful on his EEO complaint before the agency. ID at 3; AFF, Tab 7 at 3; *see Sowa*, [96 M.S.P.R. 408](#), ¶ 15 (an appellant may be entitled to attorney fees for "unsuccessful discrimination complaints" made before the agency and filed prior to a Board appeal where: the complaint arose from a common core of facts that were the basis of a Board appeal; the appellant prevailed on the appeal; and fees were otherwise warranted). In light of the administrative judge's award of fees for the appellant's EEO complaint before the agency, it is illogical that the appellant would not be entitled to fees generated in researching and briefing that same argument in his attorney fees motion.

¶15 Thus, because the record shows that the hours billed by the appellant's counsel on August 6 and August 11, 2008, were not spent on the appellant's petition with the EEOC but, instead, were spent on research and preparation of the attorney fees motion at issue in these appeals and are reasonable, we find that the administrative judge erred in disallowing these 12.3 hours. ID at 4; *see Mudrich*, [92 M.S.P.R. 413](#), ¶¶ 12-13.

¶16 Accordingly, we reinstate the 12.3 hours requested by the appellant in his attorney fees motion that were disallowed by the administrative judge, and we affirm the initial decision as modified, granting the appellant \$84,720.00 in attorney fees and \$508.91 in costs.

ORDER

¶17 We ORDER the agency to pay the attorney of record \$84,720.00 in attorney fees and \$508.91 in costs. The agency must complete this action no later than 20 days after the date of this decision. *See generally* Title 5 of the United States Code, section 1204(a)(2) ([5 U.S.C. § 1204\(a\)\(2\)](#)).

¶18 We also ORDER the agency to tell the appellant and the attorney promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the

appellant and the attorney to provide all necessary information that the agency requests to help carry out the Board's Order. The appellant and the attorney, if not notified, should ask the agency about its progress. See [5 C.F.R. § 1201.181\(b\)](#).

¶19 No later than 30 days after the agency tells the appellant or the attorney that it has fully carried out the Board's Order, the appellant or the attorney may file a petition for enforcement with the office that issued the initial decision on this appeal, if the appellant or the attorney believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant or the attorney believes the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. See [5 C.F.R. § 1201.182\(a\)](#).

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.